



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Donaldson Company, Inc.

File: B-236795

Date: December 4, 1989

DIGEST

1. Award was proper despite agency's failure to apply transportation evaluation factor to proposed prices as required by solicitation, since corrected evaluation did not change the offerors' relative standing and protester thus was not prejudiced by agency's initial error.
2. Protester is not entitled to recover protest costs where agency takes corrective action in response to protest.
3. Protest filed after closing date challenging application of a 10 percent evaluation preference for small disadvantaged businesses is untimely since agency's intent to apply the preference was evident from the face of the solicitation and apparent solicitation improprieties must be protested before the initial closing date.

DECISION

Donaldson Company, Inc., protests the award of a contract to Industrial Design Laboratories (IDL) under request for proposals (RFP) No. DAAA09-89-R-0466, issued by the U.S. Army Armament, Munitions and Chemical Command (AMCCOM) for filter canisters used for nuclear, biological and chemical warfare applications. Donaldson contends that award to IDL was improper because a transportation cost factor was not included in the agency's price evaluation of each offer as required by the RFP and because a 10 percent preference for small disadvantaged businesses (SDBs) was applied.

We deny the protest in part and dismiss it in part.

The solicitation stated that the evaluation of proposals would include a transportation evaluation "based on F.O.B. price(s) plus Government transportation cost from delivery point(s) to the destination(s) named herein." Additionally, the RFP included a clause, "Notice of Evaluation Preference

for Small Disadvantaged Business (SDB) Concerns," which provided:

"After all other evaluation factors described in this solicitation are applied, offers will be evaluated by adding a factor of ten percent (10%) to offers from concerns that are not SDB concerns and to offers from those SDB concerns which elect to waive the SDB evaluation preference. . . ."

Award was to be made to the lowest priced, technically acceptable offeror.

Offers were received from Donaldson and IDL. IDL certified that it was an SDB and elected not to waive the 10 percent evaluation preference. Accordingly, when Donaldson did not represent itself to be other than a large business, a 10 percent factor was added to its price. Without application of the preference, Donaldson's price was \$4,238,026.92; when the 10 percent factor was added, the price increased to 4,661,829.61. IDL's proposed price was \$4,575,666.00. Award then was made to IDL as the low evaluated offeror.

As noted above, the RFP stated that the price evaluation would include a transportation cost factor for those canisters to be delivered on an f.o.b. origin basis. However, when evaluating the price of each proposal, AMCCOM neglected to include the transportation cost in its final price calculation. Donaldson argues that this constituted a "fatal procedural flaw" and warrants resolicitation. We disagree.

Prejudice is an essential element of a viable protest. American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65. Here, Donaldson was not prejudiced by AMCCOM's failure to include the transportation cost in its initial evaluation of the offers. After receiving Donaldson's protest and discovering its error, AMCCOM reevaluated each proposal correctly, by including the transportation cost. Under this corrected evaluation scheme, IDL was still the low offeror.^{1/} Since Donaldson was not prejudiced, AMCCOM's initial evaluation error provides no basis to object to award to IDL. Runyan Machine and Boiler Work, Inc., B-227069, Aug. 19, 1987, 87-2 CPD ¶ 177; WHY R&D, Inc., B-221817, Apr. 16, 1986, 86-1 CPD ¶ 375.

^{1/} The correct evaluated prices were as follows:
Donaldson, \$4,698,839.85; IDL, \$4,616,851.72.

Donaldson also claims that because it pointed out the evaluation error, it is entitled to recover the costs of filing and pursuing its protest since, in Donaldson's words, discovery of the evaluation error "helped to enhance the competition." As a preliminary matter, the corrected evaluation did not change the offerors' relative standing and, contrary to Donaldson's assertion, its protest on this ground in no way served to "enhance competition." In any event, since the protest is denied on this ground, there is no basis to award costs. Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7.

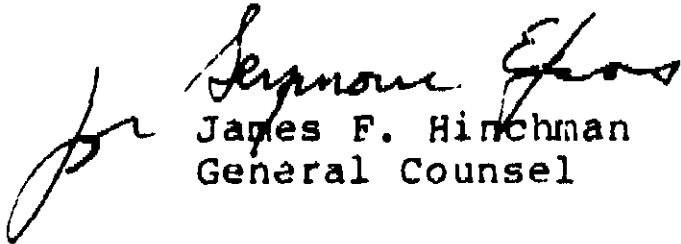
Donaldson also argues that application of the 10 percent evaluation factor to its offer created an improper "de facto SDB set-aside." As a preliminary matter, Donaldson's protest on this ground is untimely. Under our Bid Protest Regulations, an alleged impropriety that is apparent from the face of an RFP must be raised prior to the closing date for initial proposals. 4 C.F.R. § 21.2(a)(1). Donaldson contends that it had to wait until after the initial closing date before raising the alleged solicitation impropriety because it "did not know for certain until after the closing date that there was only one SDB bidding on this procurement." We find Donaldson's argument unpersuasive. The agency's intent to apply a 10 percent evaluation preference for SDBs was clearly stated in the solicitation; Donaldson knew that any small disadvantaged business competitor could receive the SDB 10 percent preference advantage. Since the terms and intent of the solicitation were clearly stated, Donaldson could not simply wait and see whether any offeror would qualify for the preference before questioning its applicability. Accordingly, since Donaldson did not file its protest prior to the initial closing date, it is untimely. Geo Marine Resources, B-233776.3, Jan. 24, 1989, 89-1 CPD ¶ 72.

In any event, there is no basis to object to application of the 10 percent preference in this case. The Department of Defense (DOD) has a statutorily-imposed goal to award 5 percent of the total dollar value of its contracts to SDBs.^{2/} To promote this goal, DOD Federal Acquisition Regulation Supplement (DFARS) § 219.7000 requires, with

^{2/} See section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986), and section 806 of the Department of Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 100 Stat. 1020, 1126 (1987).

certain exceptions not applicable here, that DOD procurements include the 10 percent evaluation preference for SDBs. Thus, contrary to Donaldson's argument, the fact that application of the preference resulted in award to an SDB in this case does not make the procurement a "de facto SDB set-aside"; the award is simply the result of the proper application of the preference as required by DFARS § 219.7000. Moreover, the fact that the awardee's actual price was higher than Donaldson's does not make the award improper. Under DFARS § 219.7000(b), an award price that results from application of the 10 percent preference factor will be allowed as long as it "will not exceed fair market price by more than 10 percent." Here, the contracting officer asserts that IDL's price was within 10 percent of the otherwise low offer and fair market price.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel